SHALINI P SHANMUGAM & ANOR A

v.

MARNI ANYIM

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH JC
[CIVIL APPEAL NO: 12-6-2006-III]
15 JANUARY 2007

CIVIL PROCEDURE: *Judgments and orders - Appeal against - Appeal against decision of Sessions Court Judge allowing claim for damages - Claim for damages by domestic helper - Whether SCJ wrong to conclude first defendant/appellant caused injuries to plaintiff - Whether second appellant has common law duty to ensure respondent worked in safe and conducive condition - Whether this court would have arrived at the same decision as SCJ - Whether this court could fault SCJ's reasoning in grounds of judgment* C D

TORT: *Damages - Appeal against - Appeal against Sessions Court Judge's decision allowing plaintiff's claim for special damages - Domestic helper suffered injuries from assault and battery - Claim by domestic helper for damages for permanent scarring and excruciating pain due to hot iron injury and injuries to plaintiff's fingers by hammer - Whether appellate court should interfere with finding of fact - Whether this court would have arrived at the same decision as SCJ - Whether this court could fault SCJ's reasoning in grounds of judgment* E F

TORT: *Duty of care - Negligence - Master and servant - Breach of employment contract and common law duty of care - Claim for damages by domestic helper - Appeal against decision of Sessions Court Judge allowing claim for damages - Whether appellate court should interfere with finding of fact - Whether this court would have arrived at the same decision as SCJ - Whether this court could fault SCJ's reasoning in grounds of judgment* G

This was an appeal against the Sessions Court Judge's decision H allowing the plaintiff's claim for special damages in the sum of RM3,000 and general damages in the sum of RM48,000 for (a) permanent scarring and excruciating pain due to hot iron injury and (b) injuries to the plaintiff's fingers caused by hammer. The plaintiff/respondent (respondent) was an Indonesian National who I entered into the employment of the second defendant/appellant (appellant) as a domestic helper. The first defendant/appellant (first

A appellant) was the wife of the second appellant. The respondent alleged that in her course of employment with the appellants, she was subjected to moral degradation, verbal and physical abuse by the first appellant. The respondent had sued both appellants in which she claimed for the said damages. Against the first appellant, B her action was for damages suffered from assault and battery inflicted by her. As for the second appellant, it was based on a breach of the employment contract between the respondent and the second appellant and also a breach of a common law duty of care based on the special relationship of master and servant. The C first and second appellants in their joint defense denied that the first appellant had inflicted the injuries as alleged by the respondent. The two main complaints were (1) that the Sessions Court Judge (SCJ) was wrong to conclude the first defendant caused the injuries to the plaintiff as there were no independent D evidence before the court and (2) the SCJ was wrong to rely on the conviction of the first appellant in the criminal case of SCJ-62-1-2001.

Held (dismissing the appeal):

E

(1) The appellants' allegation that the SCJ relied on the criminal conviction of the first appellant in coming to her decision was factually wrong. The SCJ had reached her decision without relying on the criminal conviction of the first appellant. In law, she was fully entitled to do so but she chose not to do so as F she felt that the respondent had proven her case on the balance of probability without relying on the conviction of the first appellant in the aforesaid criminal case. (para 7)

(2) In respect of the applicable law on the role of the second G appellant, the SCJ was correct to conclude that the second appellant as the employer of the respondent had a common law duty to ensure the respondent worked in a safe and conducive working condition. (para 9)

H **(3)** What the SCJ did was to make a finding of fact that the respondent's version of the events was the truthful one. In such circumstances, the law is clear and that is an appellate court would be slow in interfering with a finding of fact of the trial court unless the decision was so unreasonable that no I reasonable tribunal would have come to that conclusion. This court would have arrived at the same decision as the SCJ did. (para 3)

(4) The Sessions Court Judge in the criminal case had convicted the first appellant as charged and the same was upheld by the Court of Appeal. If one compared the above charges to the pleadings in this case, one would find that the allegations here were substantially the same as that in the criminal case. There was ample evidence in the trial that the first appellant's temperament was not one of calmness. In fact the second appellant had testified that the first appellant has violent tendencies Further, the testimonies of two doctors (PW1 and PW4) spoke for themselves. The injuries suffered were not superficial ones and also not injuries one could inflict on oneself. It was just not reasonable. Their testimonies provided ample corroboration of the testimony of the respondent. It was inconceivable that the second appellant was not aware what was happening to the respondent as he was residing together with the first appellant and the respondent. (para 11)

(5) The above facts had been alluded to by the SCJ in her deliberations. She had also analyzed all the evidence put forth by both the respondent and the appellants. She also gave valid grounds why she believed the testimony of the respondent. This court could not fault the SCJ's reasoning in her grounds of judgment. (para 12)

Case(s) referred to:

APV Hill & Mills Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor [2006] 1 CLJ 370 CA ***(refd)***

Choo Michael v. Loh Shak Mow [1994] 3 SLR 584 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Other source(s) referred to:

Halsbury Law of England, 3rd edn, p 59

For the appellants - Shalini P Shanmugam (Vijaya Kumar Govindasamy with her)

For the respondent - Shankar Ram; Thomas, Shankar Ram & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

[1] This is an appeal against the learned Sessions Court Judge's decision dated 30 December 2005 after a full trial, which had allowed the plaintiff's claim in the following terms:

A
1. Special damages in the sum of RM3,000 being the plaintiff's back wages with interest on the above special damages at the rate of 4% per annum from 27 November 2000 until the date of judgment and thereafter at 8% per annum until full and final settlement;

B
2. General damages in the sum of RM48,000 which is made up as follows:

(a) Permanent scarring and excruciating pain due to hot iron injury … RM38,000

C
(b) Injuries to the plaintiff's fingers caused by hammer … RM10,000

with interest on General Damages at the rate of 8% per
D annum from the date of filing of summons (4 January 2001) until full payment

And no order as to costs.

[2] On 22 September 2006, after hearing the parties, I dismissed
E the appeal and now give my reasons.

[3] The background facts of this case are these. The plaintiff/respondent (respondent) was an Indonesian national who came from West Kalimantan, Indonesia and on or about June 1998 she
F entered into the employment of the 2nd defendant/appellant (2nd appellant) as a domestic helper. The 1st defendant/appellant (1st appellant) is the wife of 2nd appellant. The respondent had alleged that in the course of her employment with the appellants until she ran away that she was subjected to moral degradation, verbal and
G physical abuse by 1st appellant. The abuses, itemized at para. 5 of the statement of claim included being hit by a hammer on her fingers, kicked and stabbed with a screwdriver.

[4] From the above allegations, the respondent sued both
H appellants in which she claimed for damages as set out above. About the 1st appellant, her action was for damages suffered from assault and battery inflicted by her. As for the 2nd appellant, it was based on a breach of the employment contract between the respondent and the 2nd appellant and also breach of a common
I law duty of care based on the special relationship of master and servant.

[5] The 1st and 2nd appellants in their joint defense denied that the 1st appellant had inflicted the injuries as alleged by the respondent.

[6] The memorandum of appeal contained 11 grounds as set out at pp. 9 to 11 of the record of appeal. These grounds in my view refer to two main complaints and they are, firstly that the learned Sessions Court Judge (SCJ) was wrong to conclude that the 1st defendant caused the injuries to the plaintiff as there were no independent evidence before the court and secondly the SCJ was wrong to rely on the conviction of the 1st appellant in the criminal case of SCJ-62-1-2001-1 (grounds 3 and 4 of the memorandum of appeal)

[7] The appellants' allegation that the SCJ relied on the criminal conviction of the 1st appellant in coming to her decision is factually wrong. This much is clear where at p. 225 of the record of appeal the SCJ said that her decision was reached without relying on the criminal conviction of the 1st appellant. Of course in law she was fully entitled to do so. (see *Choo Michael v. Loh Shak Mow* [1994] 3 SLR 584) But she chose not to do so as she felt that the respondent had proven her case on the balance of probability without relying on the conviction the 1st appellant in the aforesaid criminal case.

[8] I shall now deal with the first complaint. This case was a matter of making a decision on whether or not the respondent's version of the events is preferable to that of the appellants. There were no eyewitness to the assault and it was a purely a finding of facts on the part of the SCJ. In her grounds of decision this is how she put it:

> One thing is certain from the evidence adduced at the trial as admitted by Marni (the respondent) herself. When most of the injuries were inflicted on her there were no eyewitnesses. It was mostly her words against that of Mdm Shalini (1st appellant) but believed her I must for the sheer improbability of her inflicting the injuries herself is too overwhelming. The mark at her back for instance. That was clearly in the shape of an iron said Dr. Tok and from the picture shown. How anyone could have possibly inflicted such injury herself or that such a clear shaped mark was caused by hot water as alleged by the defendant is simply impossibility in itself. Why she would have wanted to hammer her own head and her finger and punched her own eyes again is totally mind boggling. Marni was never proven in the trial before

A me to be suffering from any mental aberrations or delusions which may caused her to self inflict such injuries. Besides she has provided reasons (though they may seen unjustifiable to a reasonable person) for the abuse such as forgetting to iron the children's clothes, filling in sufficient hot water for the baby's milk and dropping Mr. Vijaya's (2nd appellant) mother's portrait. Though the incidences may be small and though I have little doubt that there were times when she was treated well by the defendants (as they and DW5 testified) I do not entertain any doubt that she was also subjected to these physical abuses. She was after all a domestic helper in that household and her action in running away from the house by climbing through the fence is corroborative of the fact that she suffered those abuses at the hands of those in her employer's house and given the violent temperament of Mdm Shalini as her husband himself admitted, the probability that she resorted to physical violence was indeed real to me. Thus, on the evidence adduced I am satisfied on a balance of probability that Marni had suffered the abuses that she alleged at the hands of Mdm Shalini. In addition, as Marni's counsel has submitted Mdm Shalini's criminal convictions for causing the more serious of the injuries were *prima facie* evidence of her wrong doing and in both the Kumars' testimonies, there were nothing said or proved by them to dislodge that legal proof.

In arriving at the above finding I am mindful of Mr. Ram's submission of case authorities that Mdm Shalini's conviction was admissible evidence and *prima facie* proof of her liability. A few cases were cited by him, the persuasive one being the Singapore case of *Choo Michael v. Loh Shak Mow* [1994] 1 SLR 584.

However I felt myself able, even without resorting to the said criminal conviction to decide upon the facts before me on the liability of Mdm Shalini in this case. The usefulness of the record of appeal in the criminal trial and to me was the **material consistencies** of the evidence of abuse suffered by Marni …

In the context of this case and applying the law to the set of facts here the question that begged to be asked was whether Mr. Vijaya (2nd appellant) was aware of the abuses Marni suffered at the hands of his wife and if he did what steps, if any, he had taken to protect her from such abuses.

To that first question, and bearing in mind the burden of proof in a civil case ie, on a balance of probability, I would have to answer it in the affirmative.

The probability of his knowledge as testified by the plaintiff is to me real as theirs was a small household and the injuries sustained by Marni was not minor, the iron mark and the hammering of the fingers for instance. He claimed to only witnesses his wife shaking Marni the day before she ran away from the house something which I find quite impossible to believe as the testimony of Marni was the hammering was done at the very moment she dropped the picture frame of Mr. Vijaya's late mother and he was home then. He also knew of his wife's temperament and even if he were, for reasons which were not for me to speculate, powerless to act against her, it does not exonerate him from his culpability because his omission to act was not proven to have been caused by any extenuating factors. Marni of course did testify that Mr. Vijaya was injured when trying to help her during one instance of the physical abuse but it was not admitted by him and I do not have clear evidence that he was therefore unable to act in Marni's defence for fear of his own safety and life. Thus, the legal duty to provide her with a safe working environment, which in this case was to be translated as removing her with some urgency from being further abused still remained with him.

[9] In respect of the applicable law on the role of the 2nd appellant, the SCJ was correct to rely on *Halsbury Law of England*, 3rd edn (p. 59) to conclude that the 2nd appellant as the employer of the respondent had a common law duty to ensure the respondent worked in a safe and conducive working condition.

[10] As pointed out above, what the SCJ did was to make a finding of fact that the respondent's version of the events was the truthful one. In such circumstances, the law is clear and that is an appellate court would be slow in interfering with a finding of fact of the trial court unless the decision is so unreasonable that no reasonable tribunal would have come to that conclusion. (See *APV Hill & Mills Sdn. Bhd. v. AQ-Pacific Wide Sdn Bhd & Anor* [2006] 1 CLJ 370) or was plainly wrong (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309).

So the question which I need to address is whether or not the SCJ had made such a decision.

[11] Having analyzed thoroughly the evidences adduced in the court below and the judgment of the SCJ, I formed the view that I would have arrived at the same decision as she did had I been the presiding judge. The facts which I relied on for my view are as follows:

1. The conviction of the 1st appellant in the criminal case SCJ-62-1-2001-1 provided ample corroboration of the findings of the learned Sessions Court Judge. The charges against the 1st appellant were as follows:

First Amended charge:

> That you on the 26th day of November, 2000 at about 11.00 p.m. at No. 252, Lorong 4A7, Tabuan Laru, Kuching, in the State of Sarawak, voluntarily caused grievous hurt to one Marni bt. Anyim (F) Indonesia, PP: G 3899979 by dangerous weapon, to wit with a hammer, an instrument for hitting which when used as a weapon of offence is likely to cause death and you thereby committed an offence punishable under section 326 of the Penal Code.

Second New Charge:

> That you on the 27th day of November, 2000 between 10.00 and 11.00 a.m at No. 252, Lorong 4A7, Tabuan Laru, Kuching, in the State of Sarawak, voluntarily caused hurt to one Marni binte Anyim (f) Indonesia, PP: G 389970 and you thereby committed an offence punishable under section 323 of the Penal Code.

The learned Sessions Court Judge in the criminal case convicted the 1st appellant as charged and the same was upheld by the Court of Appeal. (See pp. 475-507 of the record of appeal which contains the judgment of the Sessions Court Judge). If one compares the above charges to the pleadings in this case, one will find that the allegations here are substantially the same as that in the criminal case. Of course I am mindful that the findings in the criminal case are not binding but for me to ignore the consistency of the findings between this case and the criminal case would defy common sense.

2. There is ample evidence in the trial that the 1st appellant's temperament is not one of calmness. In fact the 2nd appellant had testified that the 1st appellant has violent tendencies and in fact had been bound over for good behavior over an incident at the airport.

3. The testimonies of the two doctors (PW1 and PW4) actually spoke for themselves. The injuries suffered were not superficial ones and also not injuries one can inflict on oneself. It is just not reasonable. Their testimonies provided ample corroboration of the testimony of the respondent.

4. It is inconceivable that the 2nd appellant were not aware what was happening to the respondent as he was residing together with the 1st appellant and the respondent.

[12] The above facts had been alluded to by the SCJ in her deliberations. Not only that she analyzed all the evidence put forth by both the respondent and the appellants, she also gave valid grounds why she believed the testimony of respondent. In short I could not fault the SCJ's reasoning in her grounds of judgment.

[13] Accordingly, I dismissed this appeal. As for costs, Mr. Shankar Ram has informed the court that his client does not want any costs of this appeal; hence I made no order as to costs.